No. 17070

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
an Oregon Corporation,

Appellant,

v.

HERSHEY CHOCOLATE CORPORATION,
a Delaware Corporation, et al.,

Appellees.

APPELLANT'S REPLY TO BRIEF OF APPELLEE LUCKENBACH STEAMSHIP COMPANY
AND
APPELLANT'S REPLY TO ANSWERING BRIEF OF APPELLEES HERSHEY CHOCOLATE CORPORATION, ET AL.

Upon Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

FILED
JUN 5 1961
FRANK H. SCHMID, CLERK

KRAUSE, LINDSAY & NAHSTOLL,
GUNTHER F. KRAUSE,
ALAN H. JOHANSEN,
916 Oregon Bank Building,
Portland 4, Oregon,
Proctors for Appellant,
Albina Engine & Machine Works, Inc.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-61

SUBJECT INDEX TO APPELLANT'S REPLY TO BRIEF OF APPELLEE LUCKENBACH STEAMSHIP COMPANY, INC.

	Page
Argument	1
Luckenbach's Liability to Cargo	1
Albina's Liability to Luckenbach	8
Conclusion	10

SUBJECT INDEX TO APPELLANT'S REPLY TO ANSWERING BRIEF OF APPELLEES HERSHEY CHOCOLATE CORPORATION, ET AL.

Page

Statement of the Case 11

Argument 13

Degree of Albina's Fault 13

Extent of Albina's Liability for Cargo Damage 15

Applicability of Ordinance and Coast Guard Regulations 17

Conclusion 21

TABLE OF AUTHORITIES CITED IN APPELLANT'S REPLY BRIEFS

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 4 L. Ed. 2d 852 (1960) 18

Kelly v. State of Washington ex rel Foxx, 302 U.S. 1, 82 L. Ed. 3 (1937) 18

Sinram v. Pennsylvania R. Co. (CCA 2, 1932), 61 F. 2d 767 16

Verbeeck v. Black Diamond (CCA 2, 1959), 269 F. 2d 68, 273 F. 2d 61 2

Williams SS Co. v. Wilbur (CCA 9, 1925), 9 F. 2d 622 5

Yoshizawa v. Hewitt (CCA 9, 1931), 52 F. 2d 411, 79 ALR 317 14

Federal Regulations

46 C.F.R. § 146.02-20 .... 8, 17

46 C.F.R., subch. 146.27 20

No. 17070

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
an Oregon Corporation,

Appellant,

v.

HERSHEY CHOCOLATE CORPORATION,
a Delaware Corporation, et al.,

Appellees.

APPELLANT'S REPLY TO BRIEF OF APPELLEE LUCKENBACH STEAMSHIP COMPANY

Upon Appeal from the United States District Court for the District of Oregon.
HONORABLE JOHN F. KILKENNY, Judge.

ARGUMENT

Luckenbach's Liability to Cargo

The brief of appellee Luckenbach Steamship Company, Inc., is referred to herein as "Luckenbach's Brief (L. Br.)". Appellant's opening brief is referred to as "Brief (Br.)."

In its answering brief, Luckenbach takes the astonishing position that the question of Luckenbach's lia-

bility to the libelants in the first instance is of no concern to Albina (L. Br. 2).

Any such argument, it is submitted, is absurd in view of the posture of this case. It seems too apparent to require argument that in any case, whether on the civil or admiralty side of the Court, involving two or more defendants, each defendant is concerned with the question whether it is held to be solely liable to the plaintiff, or whether it is held to be one of two or more parties liable to the plaintiff. This question, in many instances, may concern a defendant as directly and vitally as does the question of such defendant's direct liability to plaintiff in the first instance.

In the instant case, an adjudication of Luckenbach's liability to the libelants is a necessary prerequisite to the entry of a decree in favor of libelants and against both Luckenbach and Albina in proportion to their fault. Obviously, this is a matter of vital concern to Albina.

In support of its argument that it is not liable to libelants, Luckenbach cites authority to sustain the proposition that "the Pennsylvania Rule does not apply" (L. Br. 4). That assertion may or may not be correct, but it seems pertinent to point out that Albina did not, in its opening brief herein, place any reliance whatsoever upon the so-called "Pennsylvania Rule."

Luckenbach urges (L. Br. 5) that *Verbeeck* v. *Black Diamond* (CA 2, 1959), 269 F. 2d 68, cited by appellant in support of the proposition that once negligence has

been shown, the burden of proof is upon the shipowner to show its lack of privity, if it would avoid liability by reason of the fire statute, is an erroneous decision. It should be observed that the article set forth in the appendix to Luckenbach's brief, relating to the question of burden of proof under the fire statute, was printed in the "Views of Our Readers" section of the American Bar Association Journal, November, 1960, and was contributed by Mr. Erskine Wood, one of proctors for Luckenbach in the trial of this case and on this appeal. Albina does not question Mr. Wood's good faith in citing that article, since the reproduction of the article in Luckenbach's brief indicates the authorship and date of publication. However, the authorship and date of publication (while this appeal was pending) should be considered before affording any authoritative weight to such article.

Of greater significance is Luckenbach's statement, in attacking the *Verbeeck* case, that the opinion was vacated and that the previous statement of the law regarding burden of proof, was expressly repudiated (L. Br. 5). The later opinion in the *Verbeeck case* (273 F. 2d 61) reveals that the earlier holding with respect to burden of proof, far from being repudiated, was reaffirmed, as is shown by the following quotations:

> "I now believe that a majority of the court was wrong in saying that a specific finding as to Svendsen's position is unnecessary because, once negligence has been shown, the burden of proof of coming within the exemption of the Fire Statute is upon the owner. This situation, namely, the establishment of negligence, did not exist until we

> established it. Hence the owner has not had the opportunity of obtaining the finding which Judge Pope's opinion indicated was necessary." (273 F. 2d at 63)

Attention is also called to the court's instructions with respect to further proceedings in the District Court:

> ". . . The owner's petition for rehearing is granted but only so far as concerns the claims of the cargo owners; and the limitation proceeding instituted by . . . the owner . . . is remanded as to claims of cargo owners for findings as to the personal negligence of the vessel owner in general, including findings as to Captain Svendsen's authority to bind the owner and as to the negligence or lack of it of Captain Wellton or any other representative of the vessel owner of such status that his negligence would be personal to the owner within the meaning of the Fire Statute. . . ." (273 F. 2d at 63)

The dissenting opinion by Clark, J., clearly expresses the view that the owner should have the burden of proving that he comes within the exemption of the fire statute, once negligence has been shown, but appears to erroneously assume that such view is repudiated by the majority opinion. 273 F. 2d at 65.

Luckenbach urges that no negligence of Sterling caused the fire and that Sterling did not know that the welding was to be done on the forward ladder in No. 5 hold (L. Br. 5). However, Sterling's negligence was in failing to provide an alternate source of water to the fire line (see Br. 34-36; 46). That negligence was a direct and proximate cause of the greater part of the damage, since the fire would have been

extinguished with minimal loss, if water had been available on the fire line. His failure to provide an alternate supply of water was a failure to exercise reasonable care regardless of where the welding was to be performed. Hence, Sterling's ignorance as to which ladder required repairs cannot relieve Luckenbach of the consequences of his negligence.

Luckenbach urges that Radovich, Luckenbach's marine superintendent, was a very minor employee (L. Br. 6) and that he emphatically was not a managerial officer (L. Br. 8). In describing Radovich's duties, counsel for Luckenbach, inadvertently no doubt, have used various descriptive words and phrases which are not found in the evidence. Radovich's "sole" function was not the hiring of longshore gangs and attending to the loading and discharge of cargo (L. Br. 6). He was Luckenbach's marine superintendent (R. 214).

Luckenbach concedes that Radovich's duties included the supervision of loading and discharge of cargo (L. Br. 6). Aside from any consideration of Radovich's other duties, the supervision of cargo loading and discharge is sufficient to establish Radovich's managerial status within the meaning of the fire statute. It was so held in *Williams SS Co.* v. *Wilbur* (CCA 9, 1925), 9 F. 2d 622, cited in Albina's Opening Brief (Br. 37, n.).

The *Williams SS* case, supra, was a libel to recover for fire damage to cargo. The trial court found that the proximate cause of the damage was improper stowage

and imperfect ventilation, and on appeal such finding was sustained. A decree for the libelant was affirmed, and the shipowner's contention that the fire statute provided a defense was rejected. Insofar as here pertinent, the holding on appeal was as follows:

> "The court below found that the method of stowage followed in this case was known to and acquiesced in by the general agent of the owner at Baltimore, who had supervision of the loading of cargo for the appellant for a period of three years. The appellant challenges this finding, but we think that it is supported by the testimony. * * * In addition to this, the appellant contends that the cargo now in question was stowed in the usual and customary manner. In the face of this testimony and this contention, it cannot be said that the owner was not responsible for the method of stowage adopted and followed, even though there is an absence of testimony tending to show that its managing officers or agents superintended the stowage of this particular cargo." (9 F. 2d at 622, 623)

If the shipowner's "general agent" had any duties other than the supervision of the loading of cargo, such other duties are not mentioned or relied upon in the opinion holding the shipowner chargeable with the agent's neglect. Thus, the *Williams* case clearly esablishes that in the instant case Radovich had managerial status, within the meaning of the fire statute; he instructed Albina to weld at the forward ladder, knowing that the flammable cargo had not been removed from the foot of the ladder, and his negligence is clearly attributable to Luckenbach.

Luckenbach contends that Radovich did not *order* Albina to repair the forward rather than the after ladder

(L. Br. 7, 8). The evidence speaks for itself, and counsel misses the point of Albina's reference to Radovich's conversation with Mr. Brewer of Albina relative to the location of the ladder needing repairs and the time when such repairs should be performed. Regardless of whether Radovich "ordered" or "notified" Albina to repair the forward ladder at the stated time, the significant fact is that Radovich clearly was aware that it was the forward rather than the after ladder which needed repair. Since it was his duty to coordinate the discharge of cargo with repair work, it was his responsibility to see that flammable cargo was cleared away from the area of the forward ladder. His negligence in failing to do so is chargeable to Luckenbach and was a contributing cause of the fire in the first instance.

Luckenbach also urges that Radovich had a right to delegate to Albina the duty of taking proper precautions to avoid a fire (L. Br. 8). This argument appears to be totally inconsistent with Luckenbach's contention that Radovich had no responsibility whatever with respect to seeing that welding could be performed with safety. He superintended the removal of cargo from the foot of the ladder and then advised Albina that it had been done—that it was now proper for Albina to proceed with the welding.

Luckenbach questions the fact that Sterling had ample opportunity, after removal of the section of the fire main, to determine whether an alternate water supply had been connected to the ship's fire line (L. Br. n., 9, 10). Sterling's own testimony clearly shows that he had

ample opportunity to determine what, if anything, had been done with regard to supplying water to the fire line. He himself testified (R. 327):

> "Q. . . . Now, when you left the vessel on the afternoon of 2 April, had the section of the fire main already been removed?
>
> A. Oh, yes; that was out in the morning."

Albina's Liability to Luckenbach

Counsel for Luckenbach saw fit to group together, for purposes of its answering brief, appellant's points III, IV and V, upon the basis that these points all relate to the question whether the District Court erred in holding Albina liable to Luckenbach (L. Br. 10).

Luckenbach urges that the welding could have been safely done if Albina's welders had taken proper precautions, and that accordingly there was no occasion for Radovich to take the precaution of removing any cargo (L. Br. 11). Its argument appears to be that because Albina was also negligent in not taking additional precautions, Radovich's dereliction of duty is excused, or should not constitute negligence. This argument is patently unsound.

Radovich knew (or was chargeable with knowledge) that there was flammable cargo within a few feet of the forward ladder. He "ordered" or notified" Albina to repair the forward ladder between 6:00 and 7:00 p.m., despite the proximity of the burlap and paper. He clearly violated 46 C.F.R., § 146.02-20, a regulation binding upon Luckenbach but not applicable to Albina (see Br.

57, 58), which prohibits welding or burning in cargo holds containing dangerous articles. Regardless of Albina's negligence, it appears clear that Radovich, in failing to see that the cargo was removed and in allowing the welding to proceed in proximity thereto, was negligent, not only for violation of the cited regulation but also for failure to exercise reasonable care under the circumstances. That negligence was a contributing cause of the fire.

Albina relied and had a right to rely on Luckenbach's undertaking that it would furnish an alternate supply of water to the fire lines. Albina had no obligation to ascertain whether Luckenbach had complied with its undertaking before welding in No. 5 hold. Luckenbach's failure to comply with its express undertaking cannot be disregarded as an active, effective cause of substantial damage to the cargo and all of the damage to the vessel.

Luckenbach has cited no authority, and it is believed that no authority is to be found, sustaining the proposition that the principles of the personal injury indemnity cases are applicable in a cargo damage case. As was pointed out in Albina's Opening Brief (Br. 71, 72), the considerations in the instant case are wholly different from those in the personal injury cases cited by Luckenbach (L. Br. 13, 14). The indemnity obligation in those cases arises out of implied contract. In the case at bar Luckenbach breached its express undertaking to supply water to the fire lines and it is obligated to indemnify Albina against claims of cargo that would

have been minimized or entirely avoided, had Luckenbach fulfilled its obligation.

Albina repaired the vessel at Luckenbach's request, and the trial court, in the face of all substantial evidence that the vessel would have sustained no damage, had water been available, dismissed Albina's libel.

CONCLUSION

Luckenbach has wholly failed to answer the issues raised by Albina on this appeal, and the Decree of the District Court should be reversed.

Respectfully submitted,

KRAUSE, LINDSAY & NAHSTOLL,
GUNTHER F. KRAUSE,
ALAN H. JOHANSEN,
Proctors for Appellant,
Albina Engine & Machine Works, Inc.

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
an Oregon Corporation,

Appellant,

v.

HERSHEY CHOCOLATE CORPORATION,
a Delaware Corporation, et al.,

Appellees.

APPELLANT'S REPLY TO ANSWERING BRIEF OF APPELLEES HERSHEY CHOCOLATE CORPORATION, ET AL.

Upon Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

STATEMENT OF THE CASE

For convenience, the answering brief of appellees Hershey Chocolate Corporation, et al., will be referred to herein as "Cargo's Brief (C. Br.)", and appellant's opening brief will be referred to simply as "Brief (Br.)".

Counsel for the appellee cargo owners ("Cargo" herein) have included in their brief a supplementary "Statement of the Case" (C. Br. 2-18), the principal purpose of which seems to be to emphasize evidence tending to

show Albina's negligence. That portion of Cargo's brief serves no useful purpose, since in its opening brief Albina admitted that "there was competent evidence sustaining a finding that Albina's failure to take additional precautions proximately contributed to the start of the fire" (Br. 62).

Nevertheless, it is necessary to here point out some of the assertions found in Cargo's supplemental "Statement of the Case" which are incorrect or misleading.

Cargo asserts that Hebert, the vessel's Chief Engineer, relied on Albina to make the connection to supply shore water to the ship's fire line (C. Br. 7). The evidence fails to sustain any such contention (see Br. 11; 14, 15; 72). There was no order issued to Albina to supply dock water to the fire line. Sterling, Luckenbach's Port Engineer, understood that the ship's engineering department would take care of this task, as did Beutgen, the First Assistant Engineer, and Hebert's testimony to the effect that he had a rather vague "impression" that Albina would make the connection is not worthy of belief.

Under the general heading "Albina's Gross Negligence" Cargo urges that Albina did not notify the captain of the port prior to commencing welding, and that Luckenbach always relied on the contractor to give such notice (C. Br. 7).

It should be noted that the trial court correctly excluded from evidence the regulation requiring such notice, on the basis that such regulation applies only to welding on "waterfront facilities", and that a ship

is not a "waterfront facility" within the meaning thereof (R. 106-108). Further, the testimony of Ensign Beeler clearly refutes any suggestion that Albina, as opposed to Luckenbach, was under the primary obligation to give such notice. Beeler was the Coast Guard officer serving as Waterfront Security Officer and charged with the duty of running routine inspections of pier facilities, checking their equipment against regulations, etc. (R. 190). He testified that the regulation requiring such notice had recently been sent to designated facilities in the Portland area, including the Luckenbach Terminal (R. 197). He did not believe that copies of the regulation had at the same time been sent to ship repair contractors (R. 198). He expressed the belief that the primary responsibility for giving advance notice of welding was upon the owners and operators of vessels and waterfront facilities (R. 198, 199).

ARGUMENT

Degree of Albina's Fault

Counsel urges that Albina was "grossly negligent" in various particulars (C. Br. 18-22). Albina's negligence has been admitted, and the authorities fail to sustain counsel's contention that Albina was grossly negligent, if it were necessary to decide that question.

None of Albina's personnel had any connection whatever with creating the dangerous condition (i.e., proximity of the burlap), which was due to Luckenbach's failure to remove the cargo to a safe distance from the foot of the ladder.

In *Yoshizawa* v. *Hewitt* (CCA 9, 1931), 52 F. 2d 411, this Court said:

> "'"Gross negligence" is that entire want of care which would raise a presumption of conscious indifference to consequences; an entire want of care, or such a slight degree of care as to raise the presumption of entire disregard for, and indifference to, the safety and welfare of others; the want of even slight care or diligence.'" (52 F. 2d at 413, citing authorities)

As was pointed out in Appellant's Opening Brief herein (Br. 62), Albina's welding foreman, after testifying as to the precautions which he took, said he believed that he had eliminated the danger of fire. There is no evidence tending to suggest that he was insincere in such belief. Surely it cannot be said that under such circumstances Albina is to be charged with "that entire want of care which would raise a presumption of conscious indifference to consequences."

In the instant case, Albina is chargeable with fault only in proceeding with the welding without taking additional precautions. Albina's welding foreman believed, albeit mistakenly, that he had eliminated the danger of fire. If gross negligence were an issue in the case, which it is not (see parties' contentions, Consolidated Pretrial Order, R. 56-69), the District Court clearly erred in characterizing Albina's conduct as "gross negligence" (Finding IV, R. 87; Finding XIII, R. 89).

Extent of Albina's Liability for Cargo Damage

In urging that Albina is liable to Cargo for all damage from the fire (C. Br. 22-31), Cargo argues that Albina relies solely upon the opinion testimony of its welding crew to establish that the fire could have been extinguished with slight damage if water had been quickly available (C. Br. 24, note 16). This obvious fact is supported not only by what counsel characterizes as "opinion testimony of the welding crew," but by the factual testimony and by the testimony of independent witnesses.

As was pointed out in appellant's opening brief (Br. 12, 13), Larson could see how big the fire was before he came up out of the hold and could see where it was burning; at the time he left the hold, the fire was confined to bales of burlap in an area about eight feet long, 39 inches wide and 40 inches high. There was no fire in any of the paper cargo at that time. When he left the hold, he had been waiting for about six minutes after the start of the fire for water to come through the hose.

None of the testimony regarding the extent of the fire at the time was contradicted. No reliance need be placed on any "opinion testimony," nor are any occult powers of divination necessary, in order to believe that the fire could have been extinguished with a minimum of damage had water, which Luckenbach had undertaken to provide, been available in the fire line. The fire hose had been lowered into the hold within two minutes after the outbreak of the fire (R. 528, 555).

Larson's opinion that he could have put the fire out if water had been available in the fire hose was confirmed by the testimony of Assistant Fire Chief Kenneth Post of the Portland Fire Department, who expressed the view that a small hose line would surely have put the fire out when it started (R. 407).

Cargo also urges that the doctrine of avoidable consequences is wholly inapplicable to Cargo (C. Br. 26). Assuming, arguendo, that such assertion is correct, this still does not mean that Cargo is entitled to recover for more than the damage proximately resulting from Albina's negligence.

A pertinent decision in this connection is *Sinram* v. *Pennsylvania R. Co.* (CCA 2, 1932), 61 F. 2d 767, where it appeared that a tug's negligence caused collision damage to a barge. The bargee negligently allowed the barge to be loaded without determining the extent of the collision damage, and the barge subsequently sank, with damage not only to the barge but to her cargo. The barge owner sued the tug, and the cargo underwriter intervened. The lower court allowed full recovery to both the barge owner and cargo.

On appeal, the court held that the owner of the barge could not recover for more than the original collision damage, the damage caused by sinking being barred by the owner's neglect in properly caring for the barge after the original damage had occurred. The tug was relieved of responsibility for unforeseeable damage to cargo.

Here, Albina should have foreseen some damage to

cargo if it allowed a fire to start in the burlap immediately adjacent to the forward ladder. However, Albina cannot be charged with the duty of foreseeing that Luckenbach would disregard its undertaking to maintain adequate water in its fire lines, which resulted in extensive damage to cargo in the after part of No. 5 hold, in the No. 4 hold, and structural damage to the ship itself.

In the *Sinram* case, supra, the remedy of the cargo owners or underwriters was against the barge and her owners; here, the remedy of the owners of cargo other than the burlap and construction paper is against Luckenbach.

Applicability of Ordinance and Coast Guard Regulations

In attempting to discredit appellant's contention that the Portland City ordinance is invalid, Cargo asserts that Albina claims that the Coast Guard regulation which forbids welding near hazardous cargo (46 C.F.R. § 146.02-20) is not applicable to the case (C. Br. 33, n.). Albina does not now and has never taken the position that such Coast Guard regulation is wholly inapplicable to the case. Albina's position with respect to the applicability of the Portland City ordinance and the various Coast Guard regulations is stated in its brief (Br. 60).

Cargo also urges, in effect, that the city ordinance does not conflict with 46 C.F.R. 146.02-20 in that the ordinance and the regulation deal, respectively, with different subject matters (C. Br. 35). Such argument is wholly untenable. The subject matter of the ordin-

ance and of the regulation is welding in the holds of vessels. There is no question but that both the ordinance and the Coast Guard regulations, to the extent applicable at all, were applicable to the SS ROBERT LUCKENBACH. (Cf., *Kelly* v. *State of Washington ex rel Foss,* 302 U.S. 1, 82 L. Ed. 3 (1937)).

The Coast Guard regulation in question provides that there shall be no welding in cargo holds under the designated conditions. By clear and necessary implication, the regulation permits welding in the absence of the designated conditions. The city ordinance attempts to go further and impose additional conditions and restrictions as to when welding may and may not be undertaken in the holds of vessels, making the ordinance clearly invalid under the *Kelly* case, supra (see Br. 53).

The authorties cited by Cargo (C. Br. 36-39) in support of its contention that the Portland City ordinance is valid are not in point, since none involved situations where it was necessary to determine whether federal and local enactments applicable to the same subject matter, and designed for the same purpose, were in conflict.

In *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 4 L. Ed. 2d 852 (1960), in holding that the local enactment did not conflict with federal regulations, the court noted that the two enactments had altogether different purposes. The court said:

> "As is apparent on the face of the legislation, however, the purpose of the federal inspection statutes is to insure the sea-going safety of vessels subject to inspection. * * * The thrust of the federal inspection laws is clearly limited to affording

> protection from the perils of maritime navigation.
> * * *
>
> "By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community." (362 U.S. at 445, 4 L. Ed. 2d at 857)

In the instant case, however, the manifest purpose of both the Coast Guard regulation and the Portland City ordinance is fire prevention aboard vessels. Since, in seeking to prevent fires aboard vessels, the city goes further than the federal regulations, and imposes additional burdens, restrictions and conditions, the local enactment squarely conflicts with the federal regulations and must be held invalid.

It is interesting to note that Cargo urges that the city ordinance relates to a matter which is not and should not be regulated by the Coast Guard regulations (C. Br. 39), and then immediately proceeds with a discussion of Coast Guard regulations which, it is contended by Cargo, were applicable to and violated by Albina. Since both the ordinance and the Coast Guard regulations relate to welding on vessels, it is difficult to see why, if that subject is not and should not be subject to Coast Guard regulations, counsel deems it necessary to discuss the Coast Guard regulations at all.

In any event, Cargo urges that Albina contends that it was free to conduct welding operations near hazardous cargo even though the ship is not (C. Br. 40). This, again, is an inaccurate statement of Albina's position. It is appellant's position that the Coast Guard regulation is not applicable to nor binding upon Albina,

and that hence such regulation is not determinative of the question whether Albina was negligent in welding where it did. It may be conceded that, independently of the regulation, Albina might be held negligent to have undertaken to perform welding in proximity to the burlap. However, Albina's negligence must be decided upon the usual considerations of reasonable care under the circumstances. Since the regulation was not applicable to Albina, no violation thereof by Albina can be deemed negligence per se.

Cargo then advances a strange argument to the effect that Albina's "use" of unspecified dangerous articles and substances in the welding operation constituted a "handling" of dangerous articles or substances within the meaning of the federal regulations (C. Br. 40). It is clear that the federal regulations defining and classifying dangerous articles and substances have reference to cargo. See 46 C.F.R., subchapter 146.27. The testimony of Ensign Beeler indicates that the Coast Guard's practical construction of these regulations was to the effect that the classification of various articles and substances as hazardous or dangerous relates to cargo (R. 194). It is clear that Albina neither "used" or "handled" any cargo whatever, nor are we advised of any specific articles or substances used or handled by Albina which are classified as dangerous or hazardous by any federal regulations.

CONCLUSION

Cargo, it is to be observed, does not contend that Luckenbach is not liable for the cargo damage. On the contrary, "Cargo was and is still of the opinion that the fire resulted from the concurring fault and negligence of Albina and Luckenbach's managing officers and agents." (C. Br. 2, 3).

Cargo's brief, as pointed out herein, includes various incorrect and inaccurate statements of fact and of law, and reveals various misapprehensions as to appellant's position. Both Cargo and Luckenbach have failed to show any valid reason why the decree should not be reversed, with directions to apportion total cargo loss between Albina and Luckenbach in proportion to fault and to allow Albina to recover from Luckenbach the cost of repairs to the vessel.

Respectfully submitted,

Krause, Lindsay & Nahstoll,
Gunther F. Krause,
Alan H. Johansen,
Proctors for Appellant,
Albina Engine & Machine Works, Inc.